PUBLIC PROSECUTOR

v.

AIDIL MA'ROF

HIGH COURT BORNEO
CHONG SIEW FAI J
[CRIMINAL TRIAL NO. KG 1 OF 1990]
30 JANUARY 1992

CRIMINAL PROCEDURE: *Admissibility - Cautioned statement - Whether there was inducement threat or promise - Burden of proof - Statutory caution - Whether explained - Recording officer - Whether he was an inspector - Trial within trial - Police (Lock-up) Rules 1953 - Whether rules apply.*

At the close of the prosecution's case the learned Counsel for the defendants conceded that there was a case for the accused to answer; defence was called accordingly and the accused chose to give a sworn statement. In the course of cross-examination the prosecution sought to refer to the cautioned statement or the contents therein made by the accused to the police. The defence objected to the move and challenged the admissibility of the statement.

Held:

[1] There was evidence upon which conclusions are capable of being drawn that the statutory caution was duly and properly administered and that no threat inducement or promise was made to the accused.

[2] The trial-within-trial was to continue at the end of which the Court shall further consider all the evidence including that of the defence if any, in their context and decide on the admissibility or otherwise of the contested statement.

[Order accordingly.]

Cases referred to:

PP v. Liik Ching Kwong [1988] 1 MLJ 399 ***(dist)***
PP v. Law Say Seck & Ors. [1971] 1 MLJ 199 ***(foll)***
PP v. Mohd Fuzi b. Wan Teh & Anor. [1989] 2 CLJ (Rep) 341 ***(foll)***
PP v. Wong Moy [1988] 2 CLJ (Rep) 352 ***(cons)***

Legislation referred to:

Criminal Procedure Code, s. 113(1)
Dangerous Drugs Act 1952, s. 37A(1)

For the accused - Karpal Singh (Anthony G.C. Bong with him); M/s. Ibrahim & Co.
For the public prosecutor - Mohamad Zaki bin Mohamad Yassin.

JUDGMENT

Chong Siew Fai J:

At the close of the case for the prosecution, learned Counsel for the defence conceded and, in my opinion, rightly, that there was a case for the accused to answer. Defence was accordingly called.

The accused chose to give sworn evidence. In the course of cross-examining the accused, the prosecution sought to refer to a cautioned statement (ID21) or some contents therein made by the accused to the police. The defence objected to the move, challenging the admissibility of the statement and hence of the contents therein. Accordingly the issue of the admissibility of the statement requires determination.

For the purpose of the issue of admissibility of the statement, the prosecution called 2 witnesses. At the conclusion of the evidence, learned Counsel for the defence raised a number of points and submitted that the prosecution had not made out a *prima facie* case and that the cautioned statement ought not to be admitted in evidence.

The relevant statutory provisions relating to admissibility of the contested statement in evidence in this case are in s. 37A of the Dangerous Drugs Act 1952 (Revised 1980) (the Act), particularly subsection (1) thereof which are, in substance, similar to those contained in s. 113(1) of the Criminal Procedure Code.

The burden of proving that a caution, in the words provided in proviso (b) to s. 37A(1) of the Act or in words to the like effect, was properly and duly administered on an accused and that the statement was voluntarily made in the sense that its making had not been caused by any inducement threat or promise having reference to the charge against the accused made or held out by a person in authority, lies on the prosecution and the standard of proof required is proof beyond reasonable doubt. In considering the admissibility in evidence or otherwise of a statement of an accused, the trial Court should apply the above test in a common sense way to all the facts in the case in their context.

In an appropriate case, it is open to a trial Court to rule after the prosecution has adduced its evidence in a "trial-within-trial" - I used the phrase for convenience's sake - that the contested statement is inadmissible, for example, where the trial Court is satisfied beyond reasonable doubt that the making of the contested statement had breached one or more of the essential requirements contained in provisoes (a) or (b) of the said s. 37A(1), or is in doubt as to the voluntariness of the contested statement or the satisfactory administration of the statutory caution. But this may not be the position in every case.

I shall now deal with the points raised on behalf of the accused.

Firstly, it was contended that there was no evidence that the recording officer PW8 Inspector Branking was an inspector at the time of the recording of the contested statement. In this connection, I agree with the learned Senior Federal Counsel that there is evidence from PW2 ASP Wenceslaus Dana that he requested 'Inspector Branking' to record a statement from the accused on 24 February 1990 at about 2.00 a.m. There was no challenge to this evidence with reference to the point raised. However, the contested statement ID21 shows that the recording officer PW8 Branking was an inspector. In *PP v. Liik Ching Kwong* [1988] 1 MLJ 399 referred to by the defence, there was, in contrast, clear evidence that the statement was made to a police sergeant. On the issue of whether to exclude the contested statement at this stage, I hold that the ground fails.

The next complaint was the meaning of the word "induce" in Bahasa Malaysia. The defence contended that "induce" in Bahasa Malaysia means "mendorong". Reference was made to Istilah Undang-Undang compiled by Biro Terjemahan Mahkamah Agung Malaysia.

On the other hand, the prosecution submitted that "Puju" and "mendorong" bore the same meaning.

No competent evidence was adduced to show the usage and the distinction of the 2 words in the context of the present issue. On the evidence and the submissions, the distinction may well be a fine one. Another matter of significance is that PW8 Inspector Branking was only asked about the equivalent of the word "induce" in Bahasa Malaysia, and there is no evidence of the actual word used in the question he put to the accused. In any event, there is, so far on record, evidence that in answer to Inspector Branking, the accused had said that there was no promise threat or inducement made to him. In the circumstances, I am unable, at least at this stage, to accept that, owing to the defence version of the Bahasa Malaysia equivalent of the word "induce" (which the prosecution disputes), there had been no exclusion of inducement threat or promise.

Some comment was directed on the proficiency of Inspector Branking in Bahasa Malaysia. However, he was not in any way seriously tested in this respect under cross-examination. From the evidence he gave and from his reception of questions and his answers given in this Court, my impression is that he could understand Bahasa Malaysia well and speak and answer in Bahasa Malaysia fluently.

I would next deal together 3 of the issue raised:

(1) that Inspector Branking read but did not explain the caution to the accused;

(2) that questions, which the inspector admitted to be vital, were not recorded. One of the questions specifically pointed out by learned Counsel for the defence was whether the accused wished to make a statement; and

(3) That the inspector failed to ask the accused why the latter wished to make a statement.

As to (1) above (caution not explained), strictly, there is no evidence that Inspector Branking had been specifically asked whether he had explained the caution to the accused. He was merely asked as to how he read out the caution to the accused (that is from some book or paper) to which his answer was to the effect that he read out the caution from memory. Under cross-examination, he was able to reproduce the statutory caution in Bahasa Malaysia. On the other hand, ID21 indicates that the caution was explained.

It cannot be disputed that explaining the caution to an accused is good and recommendable practice. In this regard, I respectfully agree with the sentiments expressed in *PP v. Law Say Seck & Ors.* [1971] 1 MLJ 199 and *PP v. Mohd Fuzi b. Wan Teh & Anor.* [1989] 2 CLJ (Rep) 341. It would be a good thing if procedures are standardised and steps taken to ensure that all recording officers follow the procedures.

However, in the instant case so far, even assuming (but without deciding) that the caution was not explained, it is my opinion that mere failure to do so does not, in itself, necessarily render a cautioned statement inadmissible in evidence. Much depends on the facts and circumstances of each case. The important consideration is that it must be ensured that the giver of the statement fully understands the caution. So far as the present proceedings go, there is evidence from the inspector and in ID21 that the accused understood the caution administered.

In *PP v. Mohd Fuzi b. Wan Teh & Anor.* [1989] 2 CLJ (Rep) 341 cited by the defence, it appears that the cumulative effect of a number of factors led to the exclusion of the statement, the most serious of which seemed to be the handcuffing of the accused. (See p. 655 1st Col. C-D). In any event, as I have said, each case must be considered in the light of its particular facts and circumstances.

As regards (2) above ('vital' questions not recorded), the questions unrecorded relate to (i) whether the accused had been promised threatened or induced, and (ii) whether the accused wished to make a statement. As in (i) above, it is my view that the failure to record the questions does not, in itself, render the contested statement inadmissible. Thus far, there is evidence that those questions were asked of the accused that the accused replied that there had been no promise threat or inducement, and indicated that he wished to make a statement.

As regard the complaint of Inspector Branking's failure to ask the accused why the latter wished to make a statement, I do not think that, in itself, would render the contested statement inadmissible. Admittedly some motives have such an effect but others would not. In our present case, there is no evidence of motive at least at the present stage.

On the evidence as it stands, I am unable to accept that the contested statement ID21 ought to be excluded from evidence on all or any of the 3 grounds advanced.

Finally, for the defence it was pointed out that recording the cautioned statement at 2.40 a.m. on 24 February 1990 was against the Police (Lock-up) Rules 1953 wherein there was a provision that "Prisoners shall be locked up for the night by 6.30 p.m. and shall rise and be dressed by 6.30 a.m".

PP v. Wong Moy [1988] 2 CLJ (Rep) 352 was cited in support. There the accused was taken out of the lock-up and interrogated for some 171/2 hours until the early hours of the morning, and, on the facts of the case, the Court held that there had been oppression.

On the other hand, the prosecution contended that the evidence showed that up to the time of his giving the contested statement the accused had never been placed in a lock-up and accordingly the Police (Lock-up) Rules did not apply.

A copy of the rules is not available to me. On the evidence so far adduced, I would not decide the applicability or otherwise of the rules to the accused but would assume for the present stage that it applies.

In my opinion, not every breach of the rules must lead to the conclusion that a contested statement must be excluded. Section 37A of the Act governs the admissibility of a statement; and a breach of the rules, if relevant, is a factor to be taken into consideration together with all the other relevant evidence deciding the issue of admissibility. On the evidence as it now stands, I do not think appropriate to consider the effect of the breach in relation to admissibility of the contested statement. If necessary, this will be done at a latter stage.

I have also given thought to the evidence so far adduced in this "trial-within-the trial" as a whole and the cumulative effect thereof. Upon such consideration I also come to the conclusion that there is no justification, at least at this stage, for the exclusion of the contested statement from evidence.

For all the reasons given above, I am unable to accept the defence submission of ruling the contested statement inadmissible. There is evidence upon which conclusions are capable of being drawn that the statutory caution was duly and properly administered and that no threat inducement or promise was made to the accused. This "trial-within-the trial" is to continue, at the end of which I shall further consider all the evidence adduced including that of the defence, if any, in their context and decide on the admissibility or otherwise of the contested statement.

Also found [1992] 2 CLJ 1239